SUPREME COURT OF THE UNITED STATES.

No. ~~38~~ 26.

JOHN BARRON, SURVIVOR, &c., USE OF L. TIERNAN, &c., PLAINTIFF IN ERROR,

VERSUS

THE MAYOR AND CITY COUNCIL OF BALTIMORE.

IN ERROR TO THE COURT OF APPEALS FOR THE WESTERN SHORE OF THE STATE OF MARYLAND.

INDEX.

	Original.	Print.
Writ of error	1	1
Citation	3	2
Bond	5	2
Declaration	10	6
General issue	13	9
Verdict	14	10
Motion in arrest of judgment	14	10
Motion overruled—judgment of county court	15	10
Defendant's first bill of exceptions	15	11
Do. second do do	33	26
Do. third do do	34	27
Assignment of errors in court of appeals	35	28
Joinder in error	36	29
Judgment of court of appeals	37	29
Clerk's certificate	39	31

UNITED STATES OF AMERICA, ss.—*The President of the United States to the honorable the Judges of the court of appeals for the western shore of the State of Maryland, greeting:*

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court of appeals for the western shore of the State of Maryland, being the highest court of law or equity of the said State in which a decision in the suit could be had, before you or some of you, between the mayor and city council of Baltimore, appellants, and John Barron, appellee, on appeal from a judgment of the county court of Baltimore county, wherein was drawn in question the validity of an authority exercised under the State of Maryland, on the ground of its being repugnant to the Constitution of the United States, and the decision of the

said court of appeals was in favor of such its validity, a manifest error hath happened, to the great damage of the said John Barron, as by his complaint appears; we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the first Monday of August next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and custom of the United States should be done.

Witness the Honorable John Marshall, chief justice of the said Supreme Court, the second Monday in January, in the year of our Lord one thousand eight hundred and thirty-one.

WILLIAM THOMAS CARROLL, [L. S.]
Clerk of the Supreme Court U. S.

Allowed by

JNO. BUCHANAN,
Chief Judge of the court of appeals.

United States of America to the Mayor and City Council of Baltimore, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the first Monday of August next, pursuant to a writ of error filed in the clerk's office of the court of appeals for the western shore of the State of Maryland, wherein John Barron is plaintiff in error, and the mayor and city council of Baltimore are defendants in error, to show cause, if any there be, why judgment rendered against the said John Barron, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable John Buchanan, chief judge of the court of appeals above mentioned, this 22d June, 1831.

JNO. BUCHANAN.

Service of the above citation is admitted.

JOHN SCOTT,
Attorney for the mayor and city council of Baltimore.
22d June, 1831.

Know all men by these presents, that we, Luke Tiernan, Charles Tiernan, and David Williamson, are held and firmly bound unto the mayor and city council of Baltimore, in the full and just sum of five hundred dollars, current money of the United States, to be paid to the said mayor and city council of Baltimore, their certain attorney or assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals, and dated this fifteenth day of June, in the year of our Lord one thousand eight hundred and thirty-one.

Whereas lately at the court of appeals for the western shore of the State of Maryland, in a suit depending in said court of appeals, wherein the mayor

334

and city council of Baltimore were appellants, and John Barron was appellee, on an appeal from a judgment of the county court for Baltimore county, judgment was rendered against the said John Barron; and the said John Barron having obtained a writ of error, and filed a copy thereof in the clerk's office of the said court of appeals, to reverse the judgment in the aforesaid suit, and a citation directed to the said the mayor and city council of Baltimore, citing and admonishing to be and appear at a Supreme Court of the United States, to be holden at Washington the first Monday of August next: Now the condition of the above obligation is such, that if the said John Barron, his heirs, executors, or administrators, shall prosecute his writ to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void, else to remain in full force and virtue.

LUKE TIERNAN. [SEAL.]
CHARLES TIERNAN. [SEAL.]
D. WILLIAMSON. [SEAL.]

Sealed and delivered in presence of
HUGH MCHENRY.

Approved by

JNO. BUCHANAN,
Chief Judge of the court of appeals.

The above bond is admitted to be sufficient.

JOHN SCOTT,
Attorney for the mayor and city council of Baltimore.

MARYLAND, sct.

At a court of appeals of the State of Maryland, one of the United States of America, begun and held for the western shore of the said State, at the city of Annapolis, on the first Monday in December, being the sixth day of the said month, in the year of our Lord one thousand eight hundred and thirty, and in the fifty-fifth year of the independence of the said United States:

Present:

The honorable JOHN BUCHANAN, *Chief Judge.*
RICHARD TILGHMAN EARLE,
WILLIAM BOND MARTIN,
JOHN STEPHEN,
STEVENSON ARCHER, and
THOMAS BEALE DORSEY, *Judges.*
JOHN JOHNSON, *Clerk.*

In the record and proceedings of the same court, among others are the following, to wit:

THE MAYOR AND CITY COUNCIL OF BALTIMORE
vs.
JOHN BARRON, *survivor of John Craig, use of Luke Tiernan, executor of John Craig.*

Be it remembered, that now here, on the first Monday in December, being the first day of the said month, in the year of our Lord one thousand eight hundred and twenty-eight, the chief judge and associate judges of the sixth judicial district of Maryland, in pursuance of the directions of the act of Assembly in such case made and provided, transmit to the court of

appeals here the record of proceedings of a plea which was lately depending before them in the county court of Baltimore, between John Barron, survivor of John Craig, plaintiff, and the mayor and city council of Baltimore, defendant, and wherein the said county court gave judgment for the said John Barron, survivor as aforesaid, against the said mayor and city council of Baltimore, and from which said judgment the said mayor and city council of Baltimore appealed to the court of appeals here; the tenor of which said record of proceedings is in form following, to wit:

The State of Maryland, Baltimore county, to wit:

At a county court of the sixth judicial district of the State of Maryland, begun and held at the court-house, in the city of Baltimore, in and for the county aforesaid, on the fourth Monday in March, in the year of our Lord one thousand eight hundred and twenty-eight:

Present:

The honorable STEVENSON ARCHER, *Chief Judge.*
CHARLES W. HANSON,
THOMAS KELL, Esquires, *Associate Judges.*
WILLIAM BALL, Esquire, *Sheriff.*
WILLIAM GIBSON, *Clerk.*

Among other proceedings are the following, to wit:

JOHN BARRON, *survivor of John Craig, use of Luke Tiernan, executor of John Craig,*

vs.

THE MAYOR AND CITY COUNCIL OF BALTIMORE.

Be it remembered, that heretofore, to wit, on the twenty-first day of March, in the year of our Lord one thousand eight hundred and twenty-two, John Craig and John Barron, by Charles F. Mayer, their attorney, prosecuted and sued forth, out of the county court here, the writ of the State of Maryland, of subpœna, directed to the sheriff of Baltimore county, in form following, to wit:

State of Maryland to the sheriff of Baltimore county, greeting:

We command you that you summon the mayor and city council of Baltimore, that they be and appear before the judges of Baltimore county court, at the court house in the same county, on the fourth Monday in March next, to answer unto John Craig and John Barron, in a plea of trespass upon the case, and so forth. Hereof fail not at your peril, and have you then and there this writ.

Witness the honorable Walter Dorsey, chief judge of our said court, the 19th day of February, in the year eighteen hundred and twenty-two.

WILLIAM GIBSON, *Clerk.*

Issued the 21st day of March, 1822.

At which mentioned fourth Monday in March, to wit, in the year of our Lord one thousand eight hundred and twenty-two, being the return day of the foregoing writ, come into the county court here the said John Craig and John Barron, by their attorney aforesaid; and the sheriff of Baltimore county aforesaid, to whom the said writ was in form aforesaid directed, makes return thereof to the court here, thereon endorsed, to wit: "Summoned John Montgomery, J. Scott, Esq. to appear.

"S. C. LEAKIN, *Sheriff.*"

335

And the mayor and city council of Baltimore aforesaid, being so forewarned, appear in court here, by John Scott, their attorney. And thereupon the mayor and city council aforesaid, by their said attorney, pray that the said John Craig and John Barron may declare against them, the mayor and city council aforesaid, in the plea aforesaid. Whereupon, it is ruled by the court here that the said John Craig and John Barron declare against the mayor and city council aforesaid, in the plea aforesaid, or judgment by the court here will be rendered against them in default thereof. And the said John Craig and John Barron, by their said attorney, pray leave of the court here to imparle until the third Monday in September next, to declare against the mayor and city council aforesaid, in the plea aforesaid; and to them it is granted: the same day is given to the said mayor and city council of Baltimore, then, and so forth.

At which said third Monday in September, to wit, in the year of our Lord one thousand eight hundred and twenty-two, until which day the said John Craig and John Barron had leave to imparle, to declare against the mayor and city council aforesaid in the plea aforesaid, come again into the county court here the parties aforesaid, by their attorneys aforesaid; and the said John Craig and John Barron, by their said attorney, pray leave of the court here further to imparle until the fourth Monday in March next, to declare against the said mayor and city council of Baltimore in the plea aforesaid; and they have it: the same day is given to the mayor and city council aforesaid, also.

At which said fourth Monday in March, to wit, in the year of our Lord one thousand eight hundred and twenty three, until which day the said John Craig and John Barron had leave further to imparle, to declare against the said mayor and city council of Baltimore in the plea aforesaid, come again into the county court here the parties aforesaid, by their attorneys aforesaid. Thereupon, further process of and upon the premises aforesaid, between the parties aforesaid, by consent of the said parties, and their attorneys aforesaid, and by order of the court here thereon, is continued until the third Monday in September next.

At which said third Monday in September, to wit, in the year of our Lord one thousand eight hundred and twenty-three, come again into the county court here the parties aforesaid, by their attorneys aforesaid. Thereupon, further process of and upon the premises aforesaid, between the parties aforesaid, by consent of the said parties, and their attorneys aforesaid, and by order of the court here thereon, is continued until the fourth Monday in March next.

At which said fourth Monday in March, to wit, in the year of our Lord one thousand eight hundred and twenty-four, come again into the county court here the parties aforesaid, by their attorneys aforesaid. Thereupon, further process of and upon the premises aforesaid, between the parties aforesaid, by consent of the said parties, and their attorneys aforesaid, and by order of the court here thereon, is continued until the third Monday in September next.

At which said third Monday in September, to wit, in the year of our Lord one thousand eight hundred and twenty-four, come again into the county court here the parties aforesaid, by their attorneys aforesaid. Thereupon, further process of and upon the premises aforesaid, between the parties aforesaid, by consent of the said parties, and their attorneys aforesaid, and by order of the court here thereon, is continued until the fourth Monday in March next.

At which said fourth Monday in March, to wit, in the year of our Lord one thousand eight hundred and twenty-five, come again into the county court here as well the mayor and city council aforesaid, by their attorney aforesaid, as the said John Craig and John Barron, by Charles F. Mayer, Peter H. Cruse, and David Hoffman, their attorneys; and the said John Craig and John Barron, by their said attorneys, declare against the mayor and city council aforesaid, in the plea aforesaid, as follows, to wit:

Baltimore county, to wit:

The mayor and city council of Baltimore were summoned to answer unto John Craig and John Barron, in a plea of trespass on the case, and so forth. And whereupon the said John Craig and John Barron, by David Hoffman, Peter H. Cruse, and Charles F. Mayer, their attorneys, complain, that, whereas the said John Craig and John Barron, before, and up to, and at the time of committing the grievance hereinafter mentioned, to wit, on the first day of January, in the year eighteen hundred and fifteen, at the city of Baltimore, at said county, were lawfully and peaceably seized in *his* demesne, as of fee, and yet are seized, and continually thenceforth were seized, as aforesaid, of and in all those three lots or parcels of ground situate in that part of the city of Baltimore called Fell's Point, and which are distinguished on a plat of the said point by the numbers 93, and 94, and 95, respectively, and together, contained within the bounds and metes, courses and distances following, that is to say: beginning for the same at the northeast corner or intersection of George and Wolfe streets, and running thence northerly, bounding on Wolfe street, two hundred feet, to Lancaster alley; thence easterly, bounding on said alley, to the water; then southerly with the water, two hundred feet, to George street; and thence westerly, bounding on George street, to the place of beginning; which said pieces or parcels of ground lie in one body as aforesaid, and are bounded by a certain navigable river called the Patapsco; which said navigable river, by the whole time aforesaid, used to flow and re-flow to and from said pieces or parcels of ground uninterruptedly: and the plaintiffs in fact say, that upon said pieces of ground, where the same bound on said river, there was, during the whole time aforesaid, a certain wharf, whereof, as aforesaid, the plaintiffs were, and yet are, as aforesaid, seized as aforesaid; by means of which said navigable river, and said ground, and said wharf, the said plaintiffs, during the whole time aforesaid, had enjoyed the advantage of sailing, and permitting others, for valuable considerations, to sail to and from the said parcels of land and wharf, with all manner of vessels, and unloading, and permitting others, for valuable considerations, to unload, at said ground and said wharf, all manner of goods, wares, and merchandise, and by and on account of the wharfage of vessels, and of the use and employment of said wharf, and of said ground, and of the buildings and appurtenances thereon and thereto belonging, the said Barron and Craig became entitled to, and derived, and had, and enjoyed, large and valuable profits, rewards, issues, benefits, and advantages, during the whole time aforesaid, and at the time of committing the grievance hereinafter mentioned; which said profits, issues, benefits, and advantages, and rewards, during all the time aforesaid, the said plaintiffs ought to have had, and still ought to have. And whereas the said Craig and Barron, at the time of committing the grievance hereafter mentioned, to wit, on the first day of January, in the year eighteen hundred and fifteen, and before

and up to that time, at the city of Baltimore, at the county aforesaid, were possessed of another piece of ground in the city of Baltimore aforesaid, being composed of and containing three lots or pieces of ground, distinguished on a plat of Fell's Point, a part of said city of Baltimore, by the numbers 93, 94, and 95, respectively; beginning for said piece of ground at the north-east corner or intersection of George and Wolfe streets, and running thence northerly, bounding on Wolfe street, two hundred feet, to Lancaster alley; thence easterly, bounding on said alley, to the water; then southerly with the water, two hundred feet to George street; and then westerly, bounding on George street, to the place of beginning: and whereas the said plaintiffs continually thenceforth, and yet are possessed of said piece of ground, which said piece of ground the plaintiffs in fact say is bounded by and lies on a certain navigable river called the Patapsco; which said navigable river, by the whole time aforesaid, used to flow and re-flow to and upon said piece of ground untinterruptedly: and the plaintiffs in fact say, that upon said piece of ground, where the same bounds and lies on said river, there was, during the whole time aforesaid, a certain wharf, whereof the plaintiffs are and were possessed as aforesaid; by means of which said navigable river and said piece of ground, and the buildings and appurtenances thereon, and of said wharf, the said plaintiffs, during the whole time aforesaid, had enjoyed the advantages of sailing to and from the said piece of ground with all manner of vessels, and of unloading at said ground and said wharf all manner of goods, wares, and merchandise, and by and on account of the wharfage of vessels, and of the use and employment of said ground, and the buildings and appurtenances thereon as aforesaid, and of said wharf, the said Barron and Craig became entitled to, and derived, and had, and enjoyed, large and valuable profits, issues, benefits, advantages, and rewards, during the whole time aforesaid, and at the time of the committing the grievance hereinafter mentioned; which said profits, issues, benefits, and advantages, and rewards, the said plaintiffs ought to have had, and still ought to have. And whereas the said plaintiffs, before, and up to, and at the time of the committing the grievance hereinafter mentioned, were, and thence hitherto have been, and still are, lawfully possessed of a certain wharf or quay at the city of Baltimore, at the county aforesaid, situate in that part of the city of Baltimore called Fell's Point, and bounding on the waters of the river Patapsco, and commonly called and known by the name of Craig and Barron's wharf, and the buildings thereon, and their and its appurtenances; and by reason thereof, the said Craig and Barron became entitled to, and derived, and had, and enjoyed, from said wharf, by and on account of the wharfage of vessels, and of the use and employment of said wharf, and its buildings and appurtenances, as aforesaid, large and valuable profits, rewards, issues, benefits, and advantages, before, and up to, and at the time of committing the grievance hereinafter mentioned; which said profits, rewards, issues, benefits, and advantages, the said Craig and Barron, during all the time aforesaid, ought to have had, and still ought to have: yet the said mayor and city council of Baltimore, well knowing the premises, but wrongfully and unjustly contriving and intending to injure the said Craig and Barron in that behalf, and to deprive them of the use, benefit, and full enjoyment and advantage of said pieces of ground, and of the said wharves, their buildings and appurtenances, aforesaid, and whilst the said Craig and Barron were so seized and possessed respectively of the pieces of ground and the wharf and wharves severally and respectively mentioned and described in the preceding courts hereof, to wit, on the

first day of January, in the year eighteen hundred and fifteen, at the city of Baltimore, to wit, at the county aforesaid, and on divers other days and times between that day and the day of impetrating the writ in this cause, and up to the time of impetrating said writ, wrongfully and injuriously turned and diverted certain streams of water, and graded and paved certain streets, and cut down certain grounds, and erected and made certain dams and ditches and embankments, by means and in consequence whereof, the waters whereon and whereat the said pieces of ground and wharves in the first and second counts hereof, and the said wharf in the last count hereof mentioned, do severally and respectively lie and bound as aforesaid, were, at the times aforesaid, and continually up to the time of the impetrating the writ aforesaid, obstructed and filled up with sand, and dirt, and clay, and otherwise, and the depth of said waters lessened, and the said Craig and Barron disturbed in the use, and deprived of the benefits and advantages aforesaid of said pieces of ground, and wharves, and wharf, and of said buildings and appurtenances; and the said mayor and city council of Baltimore kept up and continued to the time aforesaid, and yet keep up and continue, the obstructions and injuries aforesaid on those several days and times, and during all the time aforesaid, and ever since have, by the mayor and city council of Baltimore, been greatly injured and disturbed in the use, enjoyment, value, profit, and advantage, as aforesaid, of said pieces of ground, and wharves, and wharf, and buildings and appurtenances, and could not nor can have and enjoy the same in so large, ample, and beneficial a manner as they otherwise, during all the time aforesaid, and thereafter, and henceforward, might, would, and ought to have had and enjoyed, and to have and enjoy the same, to wit, at the city of Baltimore, at the county aforesaid.

Wherefore the said Craig and Barron say that they are injured, and have sustained damage to the value of twenty thousand dollars; and therefore they bring suit, &c.

DAVID HOFFMAN.
PETER H. CRUSE.
CHARLES F. MAYER.

And thereupon, on motion of the said John Craig and John Barron, by their attorneys aforesaid, it is ruled by the court here that the mayor and city council aforesaid answer to the declaration aforesaid of the said John Craig and John Barron, in the plea aforesaid, or judgment by the court here will be rendered against them in default thereof; and the mayor and city council of Baltimore aforesaid, by their said attorney, defend the force and injury, when, and so forth. Thereupon, further process of and upon the premises aforesaid, between the parties aforesaid, by consent of the said parties, and their attorneys aforesaid, and by order of the court here thereon, is continued until the third Monday in September next.

At which said third Monday in September, to wit, in the year of our Lord one thousand eight hundred and twenty-five, come again into the county court here the parties aforesaid, by their attorneys aforesaid; and the mayor and city council aforesaid, by their said attorney as before, defend the force and injury, when, and so forth. Thereupon, further process of and upon the premises aforesaid, between the parties aforesaid, by consent of the said parties, and their attorneys aforesaid, and by order of the court here thereon, is continued until the fourth Monday in March next.

At which said fourth Monday in March, to wit, in the year of our Lord one thousand eight hundred and twenty-six, come again into the county court here the parties aforesaid, by their attorneys aforesaid; and the mayor and city council aforesaid, by their said attorney as before, defend the force and injury, when, and so forth. Thereupon, further process of and upon the premises aforesaid, between the parties aforesaid, by consent of the said parties, and their attorneys aforesaid, and by order of the court here thereon, is continued until the third Monday in September next.

At which said third Monday in September, to wit, in the year of our Lord one thousand eight hundred and twenty-six, come again into the county court here the parties aforesaid, by their attorneys aforesaid; and the mayor and city council aforesaid, by their said attorney as before, defend the force and injury, when, and so forth. Thereupon, further process of and upon the premises aforesaid, between the parties aforesaid, by consent of the said parties, and their attorneys aforesaid, and by order of the court here thereon, is continued until the fourth Monday in March next.

At which said fourth Monday in March, to wit, in the year of our Lord one thousand eight hundred and twenty-seven, come again into the county court here as well the said John Craig and John Barron, by Charles F. Mayer, David Hoffman, and Upton S. Heath, and Hugh D. Evans, their attorneys, as the mayor and city council aforesaid, by John Scott and Roger B. Taney, their attorneys; and the mayor and city council aforesaid, by their said attorneys as before, defend the force and injury, when, and so forth. Thereupon, further process of and upon the premises aforesaid, between the parties aforesaid, by consent of the said parties, and their attorneys aforesaid, and by order of the court here thereon, is continued until the third Monday in September next.

At which said third Monday in September, to wit, in the year of our Lord one thousand eight hundred and twenty-seven, come again into the county court here the parties aforesaid, by their attorneys aforesaid; and the mayor and city council aforesaid, by their said attorneys as before, defend the force and injury, when, and so forth, and say that they are not guilty of the premises in the declaration aforesaid mentioned, in manner and form as the said John Craig and John Barron above against them have complained, and of this they put themselves upon the country; and the said John Craig and John Barron, in like manner, and so forth. Thereupon, further process of and upon the premises aforesaid, between the parties aforesaid, by consent of the said parties, and their attorneys aforesaid, and by order of the court here thereon, is continued until the fourth Monday in March next.

At which said fourth Monday in March, to wit, in the year of our Lord one thousand eight hundred and twenty-eight, comes again into the county court here, as well the said John Barron, one of the said plaintiffs, by Charles F. Mayer, David Hoffman, Upton S. Heath, and Hugh D. Evans, his attorneys, as the mayor and city council aforesaid, by their attorneys aforesaid; and the said John Craig doth not come; and hereupon, the said John Barron, by his said attorneys, suggests to the court here that after the last continuance of the plea aforesaid, and before this day, that is to say, on the day of last past, the said John Craig, one of the parties, plaintiff in the plea aforesaid, departed this life, and whom the said John Barron hath survived, which is not denied. Whereupon, for trying the issue above joined, it is ordered by the court here that twenty persons from the panel of jurors returned to the court here by the sheriff of Baltimore county afore-

said, be drawn by ballot, according to the act of Assembly in such case made and provided. And thereupon, the twenty persons being so drawn by ballot, and written upon two lists, one of which said lists is delivered to the counsel for the respective parties, and the counsel for each of the said parties having stricken out four persons from the said lists, thereupon, the remaining twelve persons, being called, come, that is to say, Benjamin Buck, Joseph Robinson, George Maris, James Carningham, John Patterson, George Chapman, John B. Howell, Samuel M. Barry, Basil S. Elder, Robert Nielson, Samuel Keerl, and Cecelius C. Jamison, who, *who* being empannelled, sworn, and affirmed, to say the truth in the premises, upon their oath and affirmation do say, that the mayor and city council aforesaid are guilty of the premises aforesaid, in manner and form as the said John Craig and John Barron, in the lifetime of the said John Craig, within against them have declared; and they assess the damages of the said John Barron, survivor of the said John Craig, by reason thereof, to the sum of four thousand five hundred dollars, current money. Whereupon, the said John Barron, survivor of the said John Craig, as aforesaid, prays judgment against the mayor and city council aforesaid, of and upon the verdict by the jurors aforesaid, in form aforesaid given; and the mayor and city council aforesaid, by their said attorneys, say, that the court here ought not to proceed to render judgment upon the said verdict, and pray that judgment against them, of and upon the said verdict, may be arrested, and file in court here the following reasons, to wit:

BARRON, *survivor of Craig*,
vs.
THE MAYOR AND CITY COUNCIL OF BALTIMORE.

The defendant moves the court to arrest the judgment in this case:

1. Because no special damage is legally alleged in the declaration in this cause.

2 Because it is not shown in the declaration what ships or vessels were prevented from coming to the wharf of the plaintiff by reason of the deposite and impediments mentioned in the declaration.

3. Because the injurious consequence charged in the declaration is the obstruction of the navigation of a public river, and the plaintiff does not allege a special damage which would entitle him to maintain an action.

JOHN SCOTT,
ROGER B. TANEY,
Attorneys for defendant.

Whereupon, all and singular the premises aforesaid being by the court here seen, heard, and fully understood, and mature deliberation thereupon had, for that it appears to the court here that judgment against the mayor and city council aforesaid, of and upon the verdict by the jurors aforesaid in form aforesaid given, ought not to be arrested, therefore, it is considered by the court here, that the said John Barron, survivor of the said John Craig, as aforesaid, recover against the mayor and city council of Baltimore aforesaid, as well the sum of twenty thousand dollars, current money, the damages in the declaration aforesaid mentioned to be sustained by occasion of the premises aforesaid, as the sum of four hundred and sixty dollars eighteen and a third cents, by the court here unto the said John Barron, survivor as aforesaid, on his assent, adjudged for his costs and charges by him

338

about his suit in this behalf laid out and expended; and the mayor and city council aforesaid, in mercy, and so forth.

Memorandum.—Judgment was rendered in this cause on the fifth day of May, eighteen hundred and twenty eight, for the damages laid in the declaration, and costs of suit, the said damages to be released on payment of four thousand five hundred dollars, with interest from the said fifth day of May, eighteen hundred and twenty-eight, and costs.

Memorandum.—Before the jurors aforesaid withdrew from the bar of the court here, the mayor and city council aforesaid, by their attorneys aforesaid, filed in court here the following bills of exceptions, to wit:

JOHN BARRON, jr., *survivor of John Craig,*
vs.
THE MAYOR AND CITY COUNCIL OF BALTIMORE.
} *Action on the case in Baltimore county court.*

On the trial of this cause, the plaintiff, in order to support the issue on his part, gave in evidence the plat and surveyor's explanations herewith filed; he also gave in evidence the following ordinances, parts of ordinances, and resolution of the corporation of Baltimore, all of which it is agreed may be read from the printed books, viz: The first section of an ordinance passed on the 9th of March, 1807, entitled an ordinance to appoint city commissioners, and prescribing their duties; Young's edition, pages 54, 55. The 8th section of another ordinance, passed March 24th, 1813, entitled "an ordinance to provide for the appointment of wardens of the port of Baltimore, and for other purposes; same book, page 186." A resolution relative to Wilk's street and Ann street, passed in July, 1815; in the same book, page 211. The third section of an ordinance for the extension of certain wharves therein mentioned, passed April 4, 1816; ordinance of 1816, pages 17, 18. An ordinance directing the paving of part of Dulany street, in the city of Baltimore, passed April 10th 1817; Ordinances of 1817, page 33. An ordinance for paving Wilk's street, Washington street, Castle alley, and County street, within certain distances, and for other purposes, so as more effectually to preserve the navigation, passed April 10th, 1817; same book, pages 34, 35. A further supplement to the ordinance entitled an ordinance for preserving the health of the city, passed December 3, 1821, chapter 108; Ordinances of 1822, pages 12, 13, 14. Evans's compilation, page 96. A supplement to the last ordinance, passed March 18, 1822, chapter 36; Ordinances, 1822, pages 49, 50. Evans's compilation, page 97. He also gave in evidence a deed in fee simple from Frederick Mackubin, and Mary, his wife, to John Barron, jr., and John Craig, for the property distinguished on the annexed plat by the numbers 93, 94, 95, which binds on the waters of the Patapsco, and on which a wharf is erected, known by the name of Craig's wharf.

The plaintiff also proved by Philip Moore that the said Barron and Craig had purchased the said property from the parties grantors in the said deed some time before the date of the said deed, and had been in possession thereof from the time of said purchase, continually, until the commencement of this action.

The plaintiff further gave in evidence the following order of the port wardens, dated August 30, 1813:

"*Monday, August* 30, 1813, 4 *o'clock P. M.*—The full board met, agreeably to adjournment, at the bridge on Dulany street, and passed the

following order, to wit: Ordered, that an earth abutment be raised near the intersection of Ann and Smith streets, in order to convey the water down Ann street, and that Jehu Boulden, the surveyor, be directed to give the grade of said street."

Also, the following contract between the port wardens and Jehu Boulden, dated September 6, 1813:

"*Monday, September* 6, 1813.—An agreement was this day made by the board with Jehu Boulden, by which he covenants, for the consideration of $130, to raise an abutment of earth near the intersection of Ann and Smith streets, of at least 12 feet wide at the top, and a proportional width at the bottom, and also to dig down and fill up, where necessary, the ground in Ann street, for 350 feet southerly from the said abutment, and of a sufficient breadth, to convey the surplus water down Ann street; and that the said work shall be done in such permanent and substantial manner as shall be approved of by the port wardens."

He also gave in evidence the following report of the city commissioners, made to the first branch of the city council on the 19th July, 1815:

WEDNESDAY, *July* 19, 1815.

To the mayor and city council of Baltimore:

GENTLEMEN: It is with reluctance we address you a second time at the present session, but deem it our duty to make a fuller representation of facts, in order that your honorable body may, in your wisdom, make the necessary appropriations to attain the most permanent advantages. We have taken another view of the injury sustained by the late rains on Dulany and Wilk's streets, to the east of Ann and Washington streets, and are of opinion that the repairs on Dulany street, east of Ann street, as first contemplated, had best be abandoned; and that the far better plan would be, to proceed to the cutting down and filling up Ann street, south of Dulany street, and turn the water down said street on its surface, as contemplated and expressed by an ordinance appointing the port wardens; by which means, the rebuilding of the bridge on Dulany street, which now stands opposite to private property, will be avoided, and the stones of it reserved for other purposes, and all the streets west of Ann street relieved from all the waters east of Ann street. To accomplish the above object, an appropriation of five hundred dollars, in addition to the five hundred prayed for the repairs of the damages in Dulany and Wilk's streets, making in the whole one thousand dollars, is all we ask for; all which is respectfully submitted.

HENRY STOUFFER.
ADAM FONERDON.
NATHANIEL HYNSON.

He also gave in evidence the following reports of the city commissioners and port wardens, acting in conjunction, dated May 26, 1817:

"*Monday, May* 26, 1817.—A joint meeting of the city commissioners and port wardens took place, when the following communication was read, approved, and sent to the mayor, to wit: The undersigned, city commissioners and wardens of the port of Baltimore, beg leave respectively to report to the mayor and city council, that, in pursuance of a joint resolution

339

of the council, passed at the last February session, they have, with the assistance of Messrs. Boulden and Wampler, surveyed as many of the streets east of Caroline to Ann street, inclusive, as they conceived necessary, in order to attain the object contemplated in the said joint resolution, the result of which is, that would be impracticable to turn any of the water that was directed to be conveyed down Ann street, westerly, across Market street, into the basin or cove, except on Dulany and Smith streets. They find, that, by raising Ann street at Dulany street 4 feet above the present surface, and cutting down Dulany street about 4 feet at Argyle alley, a part of the water which now goes down Ann street may be turned down Dulany street, and emptied into Harford run, if it should be considered necessary and proper so to do; and further, that a part of the water of Ann street may be carried into Harford run, along Smith street, if it should be deemed requisite and advisable to do so. Respecting the streets east of Ann street, they did not conceive it necessary to survey them, from a belief that the measures directed to be adopted at the last session of the city council would be sufficient for the present, with the addition of ordering Castle alley to be paved from Fleet street to the water; all which is respectfully submitted.

HENRY STOUFFER.
NATHANIEL HYNSON.
WILLIAM McDONALD.
JOHN SNYDER.
JAMES TAYLOR."

He also gave in evidence the resolution of the city council therein referred to, being the twelfth of , 1817, and to be found in the Ordinances of that year, page 43. He also gave in evidence the following resolution of the city commissioners, fixing the grade of Dulany street, dated June 19, 1817, and the note thereto appended.

"*Tuesday, June* 19, 1817.—The full board met. Resolved, that Dulany street, from Bond street, easterly, have an ascent on a regular grade to the west gutter of Market street, meeting the grade as heretofore established, and the east gutter of Market street to be carried across Dulany street six inches above the level of the west gutter, and to ascend six inches to the east line of said street; and from thence ascend 1½ inches in 10 feet to the centre of Argyle alley; and from thence descend 9 inches to the west gutter of Ann street, which is to cross Dulany, and the east gutter to be 4 inches higher than the west; and from thence to ascend with a regular grade of about 6 inches in 10 feet, so as to meet the grade of the turnpike road on the surface, at or about the old city line east of Castle alley, reserving the right, on the grade from Ann street, to lay Wolfe and Washington streets, and the alleys within said limits, across Dulany street, by giving the cross gutters the proper descent and ascent, so as to raise proper abuts on said cross streets and alleys.

"*Note.*—The foregoing grade will sink about 18 inches on the east side of Market street, and at Argyle alley about 21 inches, and will require raising at Ann street and Wolfe street each about 12 inches above the present surface, and will sink at Washington street about 48 inches below the present surface."

He also gave in evidence the plan and estimate of Jehu Boulden, for carrying the water complained of, eastward, into Harris's creek, through Wilk's

street; as shown on the face of a plat in the city atlas, dated February 1, 1814, entitled a plat of the grounds east of Ann street to Harris's creek, with levels for a canal, prepared by Jehu Boulden, at the instance of the subscribers, wardens of the port of Baltimore; together with an estimate of the expense of constructing a canal from Dulany at Ann street to Harris's creek at Wilk's street, and signed by E. Ellicott, John Snyder, and W. McDonald, who, it was admitted, were then port wardens, appointed by and acting under the defendants. The plaintiffs also gave in evidence the whole of said plat, which it was agreed by both parties that the defendants should and would produce in the court of appeals at the argument of this cause, to be regarded as part of this bill of exceptions. The plaintiff also gave in evidence another plat in the city atlas, respecting which the same agreement was made; the last mentioned plat is described on the face thereof as having been made at the instance of Edward Johnson, Esquire, mayor of the city of Baltimore, for the information of the city council, is dated December, 1822, and signed Jehu Boulden; upon it is *delineated* that part of the city bounded north by Monument street, west by Market street, and east by Patapsco street and Harris's creek.

The plaintiff, further to support the issue on his part, offered proof to the jury, that a considerable time before the date of the aforesaid deed, the plaintiff and John Craig, now deceased, purchased the property in the deed mentioned and described, received a bond of conveyance therefor, and that the possession thereof was, at the time of said purchase, delivered to the plaintiff and the said Craig, in the lifetime of the latter. He also offered evidence by Ephraim Smith, a competent witness, that the water from a small spring called Giles's Old Spring, and the waters collecting between Hampstead hill and Loudenslager's hill, and ran across the street then called Dulany street, (now Baltimore street extended,) and then across the grounds, discharged itself into the cove, on the west side of the point, at a place marked E on the plat; that he has been well acquainted with the said stream, its course, and the grounds over which the same passed, since the year 1784; and that the blue line, ending at E on the cove, shows the natural channel of said stream, and of the waters accumulating between the two hills aforesaid. In 1809, the said waters passed over Patterson's vacant lot, and then in front of witness's door, through deep gully or ravine; in consequence of the memorial of the witness and others to the city council, it was diverted from such its original channel to "Brick Pond," an unimproved piece of ground within the limits of the city of Baltimore, where it continued to flow until said pond was nearly filled up: that after the war, Pratt street extended was made, and then the aforesaid water was turned, and run down Market street, Fell's Point, and discharged itself into the river at the point marked F on the plat. The defendants shortly afterwards, by their agents, the city commissioners, carried into execution the ordinances and resolutions above mentioned; and, in pursuance thereof, the said commissioners made a dam at the intersection of Dulany street and Ann street, (marked N on the plat,) and thereby turned the water down Ann street; this was done about five or six years after the water was first diverted from its original channel, and conducted to the brick pond: the dam at the intersection of Pratt and Market streets, (at the point marked I on the plat,) by which the waters were so diverted from the channel, and directed to the brick pond, was the first dam raised, and was made in 1809; the dam at the intersection of Dulany street and Ann street

aforesaid was the second dam raised, and was made about the year 1815; the dam at the intersection of Ann and Smith, now George street, was the third, and was erected about the same period; the dam at the intersection of Ann and Gough streets, at O, was subsequently raised about the year 1822, and turned the water flowing from Giles's spring, and accumulating between the hills aforesaid, into Washington street; to accomplish which, the defendants caused a bank, at least twenty feet high, to be cut through; from which bank immense quantities of earth and gravel fell, and were carried down by the water into Washington street, and thence on to a point marked 22, near the plaintiff's wharf, when the water was discharged into the eastern cove, and where the deposites of earth *became* very great; and there still remain large quantities of earth in the streets liable to be carried down by future rains. Before the stream was thus diverted, the water in the cove at the point 22, near to plaintiff's wharf, at least twelve to fourteen feet deep, now, the same spot is entirely dry; this change, produced by the deposite in that part of the cove of the large *quantities* of earth thus carried down by the rain, &c., that, in heavy rains, much of the earth so carried down was precipitated beyond the point Q Q, and formed a long bank or bar, extending in front of plaintiff's wharf, and not distant therefrom; when the streets or parts thereof were paved, more dirt was carried over them and deposited. In 1798, at Gardner's wharf there were 20 feet water in the said cove, at other wharves from fifteen to eighteen; where the water was at that time twenty feet deep, it is now not more than ten feet deep. In 1815, at plaintiff's wharf there were eighteen or nineteen feet water; at that time, he has known the ship Franklin, burthened between four and five hundred tons, and drawing upwards of seventeen feet of water, could and did come up to plaintiff's wharf, receive a full cargo, and sail therefrom, as did other vessels, which have since been obliged to go to other wharves in consequence of the shallowness of the water produced by the deposites aforesaid; these deposites were occasioned by the banks put up as aforesaid, the grading of particular streets, and the cutting of the hills as stated, and the turning of the waters from their natural and accustomed channels, and bringing them down through Ann street to Washington street, thence to the point Q Q. Just before the changes commenced, colonel Brays threw the ship *the ship* General Green down at the said point Q Q, for the purpose of being repaired; there was then more than twelve feet water there, and is now dry land as stated. For one hundred yards after you leave said point, there are not two feet water in ordinary tides; at low tides it is dry: the water at plaintiff's and adjoining wharves was the deepest and best in the whole harbor; now, at the extreme point of the wharf, it does not exceed fourteen feet; and, at a little distance therefrom, a bar is produced by the deposite of the earth; over which bar a ship of ordinary burthen cannot pass; she could not be pulled over it even by means of a fast to the said wharf. At the intersection of Ann and Dulany streets, the pavement is made concave, and the whole of the waters arising as aforesaid are thrown into Ann street; the water might, at less costs, and with less injury, have been continued in its natural channel; if so, it would have been a benefit, as it would have contributed in part to fill up the western cove, which the defendants are now filling up at a very heavy expense, but no damage could have been done to the navigation of the harbor, and, by filling it up, the health of that part of the town would have been promoted; by properly grading and paving the streets, the water now concentrated and carried off through Ann and Washing-

ton streets, might have been carried off, and would have gone off through different streets, and been thus discharged into the river at different points, and produce no injury; the water now thus collected, did formerly pass off through *four* different streets, running from different directions, and then produced no injury; witness heard no complaints then about the injury to the navigation by reason of these waters. The witness stated that he had known the grounds and streams since 1784; that the western cove mentioned covers from thirty to forty acres of land, and, if the waters from the points aforesaid had been suffered to pass down its natural channel and discharge itself there, it would never have done any injury to the navigation; that the navigation to the upper harbor was injured, not by the water, or deposite by it carried down, but by Jones's Falls from the hill to the east of Washington street; the defendants have diverted the water from its natural course, and directed it also into Washington street, where it is directed to Q Q: by the gullies or ravines, it would naturally have discharged itself to the eastward of County street, or through County street; there might have been some *some* slight deposite from Alisanna street near the plaintiff's wharf, but nothing to do injury, nothing comparable to the present deposite. Witness, for a long time, was superintendent of the streets in *the* part of the town; an estimate was made of the expense of conducting the waters referred to off to Harris's creek, and, to the best of his recollection, the estimate made the costs about $6,000; it was made by William Dailey.

The plaintiff further offered evidence by Jehu Boulden, that, in his opinion, it would have been practicable to have diverted more than two-thirds of all those waters into Harris's creek, and that he was appointed by the city to ascertain the practicability of so doing by an actual survey, and to make an estimate of the expense; that the expense was estimated at $10,000. No tunnel or canal to Harris's creek was ever made, but the city proceeded to dig ditches and to erect dams as delineated on the plats; which ditches and dams diverted the waters from their natural channel down Ann street to Washington street, and other streets to Q Q on said plat. Witness always understood that the wharves at the end of Market street and Ann street, designated on said plats by the letters U and F, are city property; and by the descent of Alisanna street, at the intersection of said street and Ann street, the waters flowed east down Aliceanna street, instead of south, at the letter U.

The plaintiff further offered in evidence, by Col. Thomas Sheppard, that he was appointed, in 1813, one of a committee to ascertain the practicability of remedying the injury proceeding from the waters flowing down Ann street and Washington street; that the committee were of opinion that those waters might be mostly diverted into their natural channel, but the recommendation was not regarded by the city, and that this was a matter of great astonishment to him and others that this was not done by the city: that the city then ordered, by the ordinance and resolutions aforesaid, the ditches and mounds at N and M, designated on the plat in the cause, and that these dams and ditches produced all the mischief. The committee, of which witness was one, wished to follow the natural course to the western cove, which the city are now filling up at a great expense.

The plaintiff further offered in evidence, by William Barker, that he had lived near the property in controversy for 32 years; that there was formerly no wash whatever, the hills being in grass; the water of the eastern cove

341

was very deep, by far the best in the city; that, in 1808, Captain Vickers brought the ship Hamilton to the wharf now owned by William Dawson, near to Q Q, at twelve feet water, at the wharf which is now fast land. In 1802, the water at Curtis's wharf, next to Craig and Barron's wharf, was from 19 to 20 feet; that witness measured the depth at Dawson's, and found it 15 feet, which is now dry land; that vessels of 450 tons used to load at Craig's wharf. The deposite of mud, clay, and gravel, is at this time enormous; vessels of much burthen could not now go there, or find water.

The plaintiff then offered in evidence by James Beacham, that, in 1816, the water at the plaintiff's wharf was at least 17 feet, and much the same at Flannagan's; the depth of Flannagan's at this time is reduced to about two feet at high tide; the water at plaintiff's wharf was about 14 feet in 1826; the water at plaintiff's wharf, close to it, is somewhat deeper than at some distance out, where there is a bar of sand and gravel, wholly impassable by vessels of such burthen as might lay close to the wharf; that, in the month of June, 1826, witness, having occasion to launch the frigate Baltimore at the wharf of the plaintiff, was compelled to have a narrow channel of about 25 feet long by 10 feet deep dug, making the depth also 25 feet for the reception of the vessel, which cost witness between 200 and $300, and which sum was paid by him to the city of Baltimore for the use of their mud machine; that this channel, in the two years since it was dug, has filled up at the rate of 5 feet in two years, but that a channel of this sort would fill up sooner than a level bottom; that, before the injury to the water in the eastern cove occurred, William Flannagan's wharf and lot sold for $8,000; that witness gave for said lot, in 1827, only $900; that, if the said water lot had remained with good water, witness would have given, in 1827, $4,000 for it; that this lot is 80 feet front by about 200 feet deep, and that the plaintiff's lot is 220 feet on the water by 436 feet deep to Wholf street; that the plaintiff expended $6,000 in making the two piers delineated on the plat, but that said piers delineated on the plat *but that said piers* are now of much less value; that Craig and Barron paid for this lot $25,000 in the year 1815, that it was a very great bargain; that the plaintiff's lot was worth rather more than ⅓ than the witness's lot ever was, in proportion, because the plaintiff's was always a deeper water; that the property is now worth, he thinks, from ten to twelve thousand dollars, but that if the water had remained to this day in the state it was when plaintiff purchased it, the property would now sell for $26,000, and is injuring every day, at the rate of several feet of deposite every year.

And the plaintiff further offered in evidence by James Beacham, that after the water in the eastern cove, contiguous to the plaintiff's wharf, had been so diminished in depth, by reason of gravel and sand, that vessels no longer sought wharfage there, the said plaintiff hired a wharf of R. Oliver, and converted his own lot to a repairing wharf in 1824, '5, and for this purpose the plaintiff expended a large sum of money, witness thinks about the sum of $4,000, by which means the said property has continued to be rented in the manner already stated by him.

And the plaintiff further offered in evidence by Hezekiah Waters, that the plaintiff's water lot was always considered the best and most valuable navigable water lot in the city, until these dams and ditches diverted the waters from the natural channel to the western cove, he thinks the depth of the water was something more than twenty feet; this ruinous work was done against our remonstrances: Mr. Johnson, the mayor, never heeded;

the ruin is immense; Craig's property, as a wharf, has really no value; "I would not buy it for any thing," because, though it will do for small craft, yet no small craft ever come there, and large vessels cannot come; it is also filling up continually: the mounds threw the water entirely into a different channel, and occasioned vast ruin to private property.

The plaintiff further offered in evidence by Col. Thomas Tenant, that the plaintiff's property might now sell for $18,000 or $20,000, and if it had good water, it might, even at this time, bring $26,000. "It is difficult, however, to say; I may have overrated the plaintiff's property at this day, at $18,000, for if the deposites continue, the property must become wholly worthless, as wharf property, for it fills up rapidly;" that, in going through these new paved streets, you find at this time, that even the curb stones are often covered with sand and earth, and you would not know that they were paved. The waters that flowed naturally into the western cove was nine-tenths more than what tended to the east; and it is by the diversion of these waters down Ann street, Washington street, and others, that the injury has been principally done: that the water in that cove suffered by a wharf erected in 1807 or 1808, by James and Joseph Biays, along the south side of Alisanna street, and to the east of Washington street, that said wharf extended from Washington to County street, that it was badly made, and bursted out in front on several occasions, and the earth and gravel from it washed into the cove, and contributed to injure the depth of the water of said cove; that the earth and gravel aforesaid were washed down into the cove by the waters flowing down Washington street and Alisanna street, but mainly by the waters coming down Washington street.

The plaintiff further offered in evidence by William Price, that the plaintiff's water used to be twenty feet deep, that vessels of any burthen might load there, but that now only small craft, owing partly to a bar that runs along the wharf at some distance. That if the injury continues, this water lot can be of no value, any more than for the land, which would be a few hundred dollars; that small craft do not come to that part of Fell's point at all, and large ones always go to the wharves where the water is good, and a water of depth for small craft is of no use as far as wharfage is concerned. During the embargo, witness received, for wharfage alone, at the rate of fourteen thousand dollars a year, but the plaintiff's wharf is wholly forsaken, except for repairing small vessels and shipbuilding. The deposites from County street *is* very small, and bears no proportion to the others; it did not create the injury complained of: after every rain you can see, by the color of the water, where the mud and earth came from Washington street.

The plaintiff further offered in evidence by Jacob Dunham, that, about nine or ten years ago, the ship Franklin, drawing about seventeen feet water, laid always at plaintiff's wharf, and many other large vessels, but none have been there for many years past. In 1811, several considerable vessels lay at Dawson's wharf, where it is now dry land; Dawson's is short distance from plaintiff's, there being several narrow lots between. In witness's opinion, the mounds erected at the intersection of several streets designated on the plots, occasioned the whole injury, by diverting all the waters to the eastern instead of the western cove. Witness thinks *thinks* that the filling up of the plaintiff's water has nothing to do with any deposites coming down from County street; the mud and earth coming at Q Q is the only source worth mentioning. That the washing from the east of Argyle alley comes down Lancaster street, and empties into the cove immediately

342

north of the plaintiff's wharf, and the sediments has been dug out by the city at that place three times in the last seven or eight years.

The plaintiff further offered in evidence by Ephraim Smith, on his second examination, that he had known the western cove for forty years; that, in his opinion, it would have taken an immense time (if ever) to fill up the cove, if all the waters had been permitted to flow naturally there. The town navigation could never have been materially injured; for the chief injury which that navigation has received is from the deposites left by Jones's falls. Witness always thought that the whole of the waters complained of could have been carried down Harford run canal into the western cove, and so the commissioners also admitted, though there was some difficulty on account of George street, formerly Smith street; witness was of this opinion at all times, though his own property would have been somewhat injured, as it lies in that direction, but this was the natural course of the water, and there he thought it ought and might have been permitted to continue. That after German street was paved, the waters divided themselves naturally into four parts, one fourth might be said to run into the eastern cove, one-fourth down Market street, and one-half into the western cove, but afterwards the whole was diverted into the eastern cove. Turning the water down Ann street injured the health of the Point, and occasioned (in his opinion) the great epidemic in 1819. Witness is not a physician: witness thinks the whole of the waters might have been suffered to flow in the western cove, even with advantage.

And the plaintiff further offered evidence by Ephraim Smith, that Bond street was paved before German street, and in such a way as to be adapted to carry the water, now turned down Ann street, along Smith and German streets, both into Harford run, and that after the paving of German street the water might have been carried back nearly into its original natural course, without altering any of the established grades of the streets; and that the water might have been carried down Ann street to its intersection with Smith street, and thence, after raising Smith street to its proper established grade along Smith street, into the Harford run, and that it might have been done without raising Ann street, or altering the established grade of Dulany street or Ann street, and that this the witness thinks may or could be done at the present day.

And the plaintiff further offered in evidence by said Smith, that the navigation between the town and Point is not injured by the wash of Harford run, and could not be so by any wash down that run, but that it is injured by the wash from Jones's falls, which is much further west.

The defendants, to support the issue on their part, then offered in evidence to the jury an act of the General Assembly of Maryland, passed at November session, 1782, entitled "An act for the more effectual paving of the streets of Baltimore town, in Baltimore county, and for other purposes;" an act of the General Assembly of Maryland, passed at April session, 1784, entitled "An act appointing wardens for the port of Baltimore, in Baltimore county;" also, another act of the General Assembly of Maryland, passed at November session, 1796, entitled "An act to erect Baltimore town, in Baltimore county, into a city, and to incorporate the inhabitants thereof;" also, another act of the General Assembly of Maryland, passed at November session, 1797, entitled "A supplement to the act entitled an act to erect Baltimore town, in Baltimore county, into a city, and to incorporate the inhabitants thereof;" also, another act of the General Assembly

of Maryland, passed at December session, 1817, entitled "An act relating to the city of Baltimore;" also, another act of the General Assembly of Maryland, passed at December session, 1821, entitled "An act relating to the paving of certain streets in the city of Baltimore;" and, also, another act of the General Assembly of Maryland, passed at December session, 1822, entitled a supplement to the act entitled "An act relating to the paving of certain streets in the city of Baltimore."

And the defendants, further to support the issue on their part, then offered in evidence to the jury the following ordinances and resolutions of the mayor and city council of Baltimore, to wit, an ordinance, entitled "An ordinance to appoint city commissioners, and prescribing their duties," approved March 9th, 1807; an ordinance, entitled "An ordinance providing for the appointment of wardens of the port of Baltimore, and for other purposes," approved 24th March, 1813; also, a resolution passed at the extra session in July, 1815, No. 4; also, a resolution passed at the February session in 1816, No. 1; also, an ordinance, entitled "An ordinance authorizing the extension of certain wharves therein mentioned," approved 4th April, 1816; also, an ordinance, entitled "An ordinance directing the paving of part of Dulany street, in the city of Baltimore," approved 10th April, 1817; also, an ordinance, entitled "An ordinance for paving Wilks street, Washington street, Castle alley, and County street, within certain distances, and for other purposes, so as more effectually to preserve the navigation," approved 10th April, 1817; also, an ordinance, entitled "A further supplement to the ordinance entitled "An ordinance for preserving the health of the city," approved 3d December, 1821; also, an ordinance, entitled a supplement to an ordinance entitled "A further supplement to the ordinance entitled an ordinance for preserving the health of the city," approved 18th March, 1822.

The defendants, further to support the issue on their part, then offered in evidence to the jury, that the grading and paving of the streets hereinbefore mentioned, to wit, of German, now Pratt street, of Dulany street, of Ann street, of Gough street, of Washington street, of Wilks' street, of County street, of Castle alley, and of the other streets, lanes, and alleys, mentioned in the evidence, and delineated on the plat, were made in pursuance of the acts of Assembly and ordinances hereinbefore mentioned; the dams and abutments mentioned in the evidence, and delineated on the plat, were erected in pursuance of the said acts of Assembly and ordinances; that the dam at I, at the intersection of German and Market streets, was erected in the year 1809, to divert the water which flowed into the cove at E, into the ponds between German and Gough streets; that German street, from Harford run to Market street, was graded and paved in the year 1813; that the abutment at N, at the intersection of Dulany and Ann streets, was erected by the port wardens in 1813, to dam up the water, and raise up the valley to the north of Dulany street at Ann street; that the abutment at M, at the intersection of George and Ann streets, was erected by the port wardens in 1813, to prevent the water from passing westwardly, and for the purpose of diverting it down Ann street: that Ann street, south of Dulany street, was cut down and filled up so as to turn the water down said street, in pursuance of the resolution directing the same; and that the abutment at J K, at the intersection of Ann and Bank streets, was also erected in the year 1815, to prevent the wash from passing further down Ann street, and directing it eastwardly into Bank street, and from thence into Washington street; and

that the abutment at O, at the intersection of Gough and Ann streets, was erected in the year 1822, to prevent the water from passing across Gough street down Ann street, and for diverting it into Gough street, and from thence into Washington, and down into the harbor at Q Q.

The defendants then, further to support the issue on their part, offered in evidence to the jury, by Henry Stouffer, a witness affirmed at bar, that, from the year 1809 to the year 1818, both inclusive, he was one of the city commissioners; that, during that time, his attention was especially directed to the situation of a stream of water which flowed into the cove at E, from the intersection of Dulany and Ann streets; that, except during the fall of heavy rains, the said stream was very inconsiderable, and did no injury, but that the stream, by the fall of heavy rains, was increased by the rain which fell to the northward and eastward, and between and on the hills C B D and E F H, into a formidable torrent, and that it was calculated to do great injury to the navigation, in consequence of the great quantity of earth, gravel, and sand, which the said torrent carried with it to tide water. That it became his duty to examine into the best and most practicable mode of conducting the said stream into the harbor; that a grade had been already established by his predecessors on Dulany street at its intersection with Market street, the level of which grade was above the level of the grade of Dulany street at its intersection with Ann street: that the grounds north of Dulany street, between Ann and Market streets, rise to a considerable elevation; that Harford run already carried down a great quantity of water, earth, and gravel, into the western cove; that the ground south of Dulany street, between Bond street and Harford run, is of a level surface, and would be liable to be overflowed by introducing an additional quantity of water into Dulany street; and that the introduction of the water, earth, and gravel, which came into Dulany street at Ann street, into Harford run, would, in his judgment, have produced in time a serious injury to the western navigation between the town and Point: that a great quantity of earth, gravel, and sand, were already carried into the basin from the west end of the city, from the south side of the basin, through the different streets of the city by Jones's falls, and also by Harford run, and that it was of great consequence to divert the wash from Dulany street to the east end of Fell's point. That the said wash was in part diverted from the western cove by the paving of German street in the year 1813, and afterwards flowed down Market street, and from thence into Fleet and Alisanna streets, and from thence a portion of it flowed into the eastern and western coves, and a portion of it down Market street; that a portion of the said wash, in heavy rains, passed from Market street to Bond street, and from thence through Wilk's street into the cove, passing also over the lots of individuals; that, in consequence of their inconvenience to the settled parts of Fell's point, in the year 1815, the said water was diverted into Ann street, and from thence into Bank street, and from thence into Washington street, and from thence into the harbor at the intersection of Washington and Alisanna, into the basin at Q Q; and that, in his judgment, this was the best possible *cause* of introducing the said wash into the harbor, having regard to the general interests and prosperity of the city.

And the defendants further offered in evidence by the same witness, that, in the year 1817, a great freshet took place, which did great mischief to the harbor; that the dam at J K was carried away, and, also, a dam between Washington and County streets on Wilk's street, which did great injury to the navigation of the eastern cove, in addition to the wash from Ann street.

And the defendants offered in evidence by the same witness, that, in his opinion, it was impracticable, although not absolutely impossible, but inexpedient, to carry the water from Ann street into Harris's creek; and that, in the year 1817, an abutment was erected on Gough street near County street divert the water which passed from the northeast into the harbor, as delineated by the small blue line at G, into County street, for the purpose of relieving, in a degree, the property of the plaintiffs, and diverting the water from Washington street, and in order to prevent too much water from entering the basin at one point; that he thought the public convenience required the diversion of the water to the east, which tended west, as it injured the navigation. If Market street had been raised and paved, it might have sent the waters into different directions, but this was not done. As to the tunnel at Harris's creek, it was impracticable, as the distance was perhaps a half mile or more, and through high grounds, and the commissioners, one of whom he was, had several reasons for seeking for an eastern direction for the waters, which were principally four: first, because it would require a change in the grade of a point in Dulany street, on the east of Market street; secondly, because Ann street must have been raised 4 feet, and Dulany street depressed 4 feet, or, what would have been equivalent, Dulany street must have been raised 8 feet to carry off the water from Ann and Washington streets to Harford run; and thirdly, because Harford run, in his opinion, was not sufficient to carry off the waters; and fourthly, because the navigation must have suffered; that all of these measures for turning the waters into the eastern cove were recommended by the witness to the city council, particularly the diversion of the waters down Ann street.

And the defendants further offered in evidence by Nathaniel Hynson, a witness sworn at the bar, that he was one of the city commissioners from the year 1818 to the year 1819, both inclusive; that the said witness concurred with Henry Stouffer and James Martin, the other commissioners, that it would be inexpedient and productive of great evil to carry the wash from the ravine north of Dulany street into Harford run, and thence into the western cove; that, in his opinion, Harford run was insufficient to receive the same; and that the introduction of said wash into Harford run would have been highly injurious to the western navigation, and would have tended, in conjunction with other causes, as stated by Henry Stouffer, to destroy the said navigation; and that, in his judgment, having regard to the best interest of the city at large, the best disposition which could be made of the said wash from Dulany street was the introduction of it into the eastern cove, thereby keeping the same out of the heart of the navigation, and carrying it where it would do least injury.

And the said witness further gave in evidence, that after the said wash was diverted into Market street, and before Ann and Gough streets were opened, that part of said wash which came down the east gutter of Market street passed through Fleet and Alisanna streets into the east cove, near the property of the plaintiffs.

And the *witness* further offered in evidence, that what was called the town interest was for diverting the water east, but the Point interest was for its running west; and, in order to divide responsibility, the city commissioners united with the port wardens, and agreed upon the erection of mounds, for the purpose of giving the waters an eastern direction, as the western direction would require a very inconvenient grade. That Harford street itself would not have been sufficient, but if the run had been enlarged the water

344

could have been discharged, unless in case of such a freshet as occurred in August, 1817; that the said disposition of the waters was made after much deliberation, and after taking then what he considered the best advice.

And the defendants further offered in evidence to the jury, by William McDonald, a witness sworn at the bar, that he was one of the port wardens from the years 1813 to 1819, inclusive; that the dams at the intersection of Dulany and Ann streets, and the dam at the intersection of Smith and Ann streets, were erected in the year 1813; that the whole of the work done under the direction of the port wardens was done with a view to preserve the navigation of the harbor; that the wash which collected in Dulany street, at its intersection with Ann street, did great injury to the navigation of the harbor whenever it met the tide; and that when the said wash was diverted into Market street, a pen was erected at the end of the said street to prevent the said wash from going into the navigation; that the dam at N, across Ann street, was erected to intercept the wash which came down the ravine at the intersection of Dulany street and Ann street, and to prevent it from passing into the harbor. And also offered evidence by the same witness, that the grounds eastward, from Ann street to County street, rise to a great elevation, and are very much broken and gullied, and have been a good deal dug for pebble ballast, and that these causes have increased the washings from the hills, and that in his judgment it was of great importance to the general interests of the city to divert the washings from Ann street from the western navigation; that the washing from the hills to the east of Ann street were in his opinion very detrimental, and that the interests of the city required their diversion from the western navigation; that his motive for uniting in this order was the existence of a deep hole dug in the high bank on the side of George or Smith street, by the city and others, for procuring paving sand, and that the waters carried much of these loosened sands into the western cove, whereby the navigation was suffering: his opinion was, that if the waters had been divided and diffused, instead of being united either into eastern or a western direction, the evil would have been inconsiderable; that their general duties as wardens extended to the protection of the whole navigation, but in the particular alteration made they thought the water would be diffused, and would not do injury any where; the eastern navigation did not occur to them, or that any injury could be there done; that he now thinks that the dam above referred to, and made, independent of any alterations subsequently made, nor have caused injury to the navigation any where.

The defendants further offered in evidence by witnesses sworn at the bar, that they and each of them have been for many years residents of Baltimore, and are acquainted with the progressive improvements in the different parts of the city, and with the opening of Ann street, Gough street, Washington street, Wilk's street, County street, and Castle alley; that they are well acquainted with the nature of the wash which collects at the intersection of Dulany and Ann streets, and, in their judgment, the said wash should have been carried into the eastern cove in preference to the western cove, and that the same, having regard to the general interest and prosperity of the city, was properly carried there.

Frederick Schaeffer, one of the said witnesses, said that he is not much of a judge, but supposes that if the water from Dulany street had been carried into Harford run, that it would have injured the western navigation.

The defendant then offered in evidence by David Williamson, that the stream marked on the plat from H to E was generally a dry one in the sum-

mer, but a violent one in the winter and during rains; that in his opinion it was better to bring the waters east than west, for the good of all, because it was taken in the shortest course to the basin; any course, however, would have been very inconvenient; but the least expensive and inconvenient direction, in the opinion of the city council, was the eastern; the commissioners were very anxious to preserve the basin; Jones's falls deposited a good deal, and also Harford run.

The defendant further offered in evidence by John Hillen, that the stream from H to E on the plat was a natural one, but was ordinarily quite a trifling little stream, from streams flowing from Hampstead and Chinquepin hills; that naturally it would go through a bore of the size of a thimble at this time, but it became a torrent in time of rains, which torrent pursued the same course, viz. from H to E; that Harford run is also small, but is considerable in time of rain; the walls of Harford run canal are about 15 feet apart, this canal has a very slight fall down to the western cove; the fall of Harford run is about one inch in ten feet, but sufficient to carry off the water very well; the city block was made to fill up the cove by making fast land of that which was neither water nor dry land ever since his boyish days; that it was always flat and shallow at that place within his memory; that from Wilk's street to the deep or navigable water was about four or five hundred yards, which must have been first filled up before the navigation could have been much injured; that whether it was for the good of the whole that these waters should have been turned east instead of flowing west, was a matter of opinion; that the best, in his opinion, for the general interest, was done; had all the waters gone west it would have been irresistible, but perhaps they might have been divided.

And the defendants further offered in evidence to the jury, by Frederick Schaeffer, that he resided in Baltimore since 1784; that the stream from Hampstead hill to the western cove was something of a stream, and became very large when it rained; the city wished to turn it down Ann street, and therefore raised the mounds: he thinks the city did the best that could be done for the good of the town; that even forty years ago the water in Harford run at one time got so high by a three hours' rain as to drown a man: witness's property is situated near to Harford run, it is between Eden and Caroline streets, and nearer to said run than to Ann street; that he has known it to overflow twice since the great bridges were carried away, which was in 1817, but he has never known it to overflow since the extension below Pratt street, which was begun in 1823.

The defendant further offered in evidence by the said William McDonald, that there is a great tendency in every part of the harbor of Baltimore to become shallower from the washings from the surrounding hills, and that the mud machine is necessarily occasionally used in every part of it in order to keep the water at its accustomed depth, and that it is applied by the city in the channel and at ends of streets and public wharves, but is never applied at the expense of the city within fifty feet of a private wharf in any part of the city of Baltimore; the individual owners have them dug out at their own expense.

Whereupon the said defendants prayed the opinion and direction of the court to the jury, that in passing the several ordinances and resolutions offered in evidence by the plaintiff, the mayor and city council of Baltimore acted within the scope of the authority conferred on the said corporation by the laws of this State, and that the plaintiff therefore is not entitled to re-

345

cover damages against the said corporation in this action for the loss he may have sustained by the filling up of the water at his wharf, as stated in the testimony. First, because the corporation, and its agents and servants, in making the said alteration, acted as public agents in discharge of a public duty imposed on them by law. Second, because the corporation consists of the inhabitants of Baltimore city, and they are not liable to any injury done to by the acts of their servants and agents, which were not commanded by the said corporation. Third, because the river and the soil of the river being the property of the State, and the defendants being the agents of the State, clothed with discretionary powers with regard to the preservation of the navigation of the harbor, the defendants are not liable in this action for the consequences resulting from their acts as complained of in the declaration, and stated in the evidence. Fourth, because if any wrong has been done in filling up the cove, it is a public nuisance, and the plaintiff upon the evidence above stated has not sustained such an injury as will so entitle him to maintain an action.

2d. Prayer. The defendants also prayed the opinion and direction of the court to the jury, that, in grading and paving the several streets, and damming and turning the water at the several places marked on the plat, and stated in the evidence, the officers, servants, and agents, of the mayor and city council of Baltimore acted within the scope of their lawful authority; and if the jury find from the evidence that they acted bona fide, and to the best of their judgment, then the present action cannot be maintained against the said corporation for any thing done by their said officers, servants, or agents, in manner aforesaid; which opinion and direction the court refused to give to the jury, but were of opinion, and so directed the jury, "that the plaintiff will be entitled to a verdict, if the jury believe from the testimony that the plaintiff's property was injured by the washings occasioned by the diversion of the waters from flowing into the western cove and turning them into the eastern cove, and only to damages proceeding from such a source, as the counsel for the plaintiff have admitted that they are not entitled and do not claim damages on account of that portion of the injury which may have been sustained by the washings from such of the waters into the eastern cove as would naturally have flowed there, notwithstanding, by the grading and cutting down of Washington and other streets, the waters which naturally flowed into the eastern cove carried down more earth and sediment than before said gradings and cuttings they had been accustomed to do; that when the jury ascertain the lessened value of the plaintiff's property by the injury done to the property as a wharf, or, in other words, the amount of its depreciation in value, proceeding from that cause, and when they also ascertain the losses sustained by the plaintiff by the diminished income or profits of his property, proceeding from such cause, these amounts, when ascertained, together with any damages the jury may reasonably think the plaintiff may be entitled to, from any inconvenience he may have sustained by being compelled to change the employment of his property, will constitute the true measure of damages; that in ascertaining these amounts they must confine themselves to a consideration of the injury sustained prior to the 21st of March, 1822, the day of issuing the writ; that in the estimation of the damages it is fair and proper that the jury should take into consideration the uses to which the property has been devoted since the infliction of the injury; and in estimating its permanent injury it is right and proper that the jury should look at its capacity, and of course

its value for other purposes, as it will be only by an examination and consideration of these matters that the real injury and actual damages can be fairly ascertained; that if the jury believe the plaintiff's property has been injured by the diversion of the waters from the western cove to the eastern cove, and that such diversion was neither malicious, negligent, or careless, but was even beneficial to the general interests of the city, made with the best advice, and with due circumspection, consulting the general prosperity of the city and its inhabitants, either for securing the health of the city, or of preserving more effectually its navigation, still, notwithstanding the jury should believe these facts, the plaintiff is entitled to damages for the injury the jury shall find the plaintiff may have sustained, in as much as this general improvement would, in such case, be made for the benefit and advantage of the inhabitants of Baltimore, and it would be unjust that the property of the plaintiff should be deteriorated, (and to the extent of such injury,) deprived of his property without remuneration." To which opinion and direction of the court to the jury, the defendants, by their counsel, prayed leave to except, and that the court would sign and seal this their bill of exception, according to the form of the statute in such case made and provided, which is accordingly done, this fourteenth day of May, in the year of our Lord one thousand eight hundred and twenty-eight.

STEVENSON ARCHER. [SEAL.]

BARRON, *survivor of Craig,*
vs.
THE MAYOR AND CITY COUNCIL OF BALTIMORE.

At the trial of this cause, the plaintiff, further to support the issue on his part, in addition to the evidence stated in the aforegoing bills of exceptions, offered in evidence to the jury, by Hezekiah Waters, a competent witness, sworn at the bar, that he is the proprietor of a wharf about two or three hundred yards south, from the years 1814 and 1815; the income of his wharf was about $2,000 per annum; that from 1815 to 1817 it was from $1,500 to $2,000; and that the income of his wharf has depreciated by the depression of commerce about fifty per cent. The plaintiff also offered in evidence, that his wharf has births for eight ships, and that the wharf of the plaintiff has births for five ships; that his wharf has storehouses, and that the plaintiff's has none; that the wharfage of the plaintiff's wharf, from the year 1815 to 1817, he supposes to have been worth from $800 to $1,000 per annum. The plaintiff also offered in evidence, by James Beacham, a competent witness, that, in the year 1820, he rented the space between the piers of the plaintiff's wharf as a ship yard, for $300; that, in the year 1825, he rented the whole of the wharf property, including the spar house, 120 feet long, and other buildings, except the blacksmith and boatbuilder's shop, for $700 per annum; that if there was the same depth of water there now as in the year 1816, the property would be worth about $400 or $500 more to him for his purposes. The said witness also stated that the ship Franklin, of about 350 tons, drawing about 15 or 15½ feet water, was at the said wharf, he thinks, for the last time, in the year 1823 or '4, but after being delayed by the shallowness of the water, when loaded had some difficulty in getting out, and has not returned. The plaintiff also offered evidence, that his piers were built in the year 1816, and that they cost $6,000.

Whereupon the said defendants prayed the opinion and direction of the court to the jury, that, upon the said evidence, the plaintiff is not entitled to

340

recover beyond the loss he may prove himself to have sustained in the loss of income from the said wharf, during the time stated in the declaration, unless the jury should find, from the evidence, that there has also been a permanent injury done to the wharf itself, in addition to the impediment of the navigation to it; which opinion and direction the court refused to give to the jury, and referred the jury to the opinion contained in the first bill of exceptions, which were accordingly again given to the jury, as they are in the first bill of exceptions stated; to which opinion and direction of the court to the jury, the defendants, by their counsel, prayed leave to except, and that the court would sign and seal this his bill of exception, according to the form of the statute in such case made and provided, and which is accordingly done, this fourteenth day of May, in the year of our Lord one thousand eight hundred and twenty-eight.

STEVENSON ARCHER. [SEAL.]

BARRON, *survivor of Craig*,
vs.
MAYOR AND CITY COUNCIL.

At the trial of this cause, upon the evidence offered to the jury, as detailed in the preceding bills of exception, the defendants prayed the opinion and direction of the court to the jury. 3. That as the present action was brought on the 21st of March, 1822, and as no evidence has been offered to show that any particular vessel, before the institution of this suit, was prevented from going to said wharf, by reason of the diminished depth of the water in the said cove, or at or near the said wharf, the plaintiff has not shown himself entitled to recover, in this action, any special damage for the loss of wharfage at said wharf; which opinion and direction the court refused to give; and the defendants, by their counsel, prayed leave to except, and that the court would sign and seal this their bill of exceptions, according to the form of the statute in such case made and provided; and which is accordingly done, this fourteenth day of May, in the year of our Lord one thousand eight hundred and twenty-eight.

STEVENSON ARCHER. [SEAL.]

BARRON, *survivor of Craig*,
vs.
MAYOR AND CITY COUNCIL.

At the trial of this cause, upon the evidence offered by the plaintiff to the jury, as detailed in the preceding bills of exception, the defendants prayed the opinion and direction of the court to the jury, that no special damage is sufficiently charged in the declaration, and that the plaintiff, upon the pleadings in this case, is therefore not entitled to recover; which opinion and direction the court refused to give; and the defendants, by their counsel, prayed leave to except, and that the court would sign and seal this their bill of exception, according to the form of the statute in such cases made and provided, which is accordingly done, this fourteenth day of May, in the year of our Lord one thousand eight hundred and twenty-eight.

STEVENSON ARCHER. [SEAL.]

Whereupon the parties aforesaid, by their attorneys aforesaid, filed in court here the following agreement, to wit:

BARRON, *survivor of Craig,* vs. THE MAYOR AND CITY COUNCIL OF BALTIMORE. } *Action on the case in Baltimore County Court.*

It is agreed that the acts of Assembly and ordinances of the mayor and city council of Baltimore, given in evidence at the trial of this cause, shall not be inserted at length in the bill of exceptions, but that the same may be read from the printed copies thereof in the court of appeals. It is also agreed that the plats in this cause, the several maps of the city atlas, which have been given in evidence to the jury, and Poppleton's map of the city of Baltimore, form a part of the evidence, and that the same shall be produced on the trial of this cause in the court of appeals.

HUGH D. EVANS,
U. S. HEATH, *for pl'ff.*
JOHN SCOTT, *attorney for def'ts.*

And thereupon the said mayor and city council of Baltimore, by their attorneys aforesaid, pray an appeal from the judgment aforesaid, so as aforesaid rendered to the court of appeals for the western shore of the State of Maryland, and to them it is granted. It is therefore ordered by the court here, that a transcript of the record and proceedings in the plea aforesaid, with all things thereunto relating, be transmitted to the said court of appeals, and the same is transmitted accordingly.

Test: WM. GIBSON, *Clerk.*

In testimony that the foregoing is truly taken from the record of proceedings of Baltimore county court, I have hereto subscribed my name, and affixed the seal of the said court, this thirty-first day of July, in the year of our Lord one thousand eight hundred and twenty-eight.

WM. GIBSON, [L. S.]
Clerk of Baltimore county court.

And now come into the court of appeals here, as well the said mayor and city council of Baltimore, by John Scott, their attorney, as the said John Barron, survivor as aforesaid, by Charles F. Mayer, his attorney; and thereupon, on motion of the said John Barron, survivor as aforesaid, by his attorney aforesaid, it is ruled by the court here that the said mayor and city council aforesaid assign the errors in the record of proceedings aforesaid, or in the giving the judgment aforesaid, so as aforesaid brought before the court of appeals here, for correcting the errors supposed to be therein, or judgment by the court of appeals here will be entered against them in default thereof: and the said mayor and city council aforesaid, by their attorney aforesaid, say, that in the record of proceedings aforesaid, and also in the giving of judgment aforesaid, there is manifest error in this, to wit, that by the record aforesaid it appears that the judgment aforesaid, in the plea aforesaid given, was given for the said John Barron, survivor as aforesaid, against the said mayor and city council of Baltimore, when, by the law of the land, that judgment ought to have been given for the said mayor and city council aforesaid against the said John Barron, survivor as aforesaid, therefore in that there is manifest error; and they pray that the judgment aforesaid, for that error and others, being in the record of proceedings

347

aforesaid, may be reversed, annulled, and held entirely as void; and that they, the said mayor and city council aforesaid, may be restored to all things which they have lost by occasion of the said judgment, and that the said John Barron, survivor as aforesaid, may rejoin to the errors aforesaid, and so forth. And thereupon it is ruled by the court of appeals here, that the said John Barron, survivor as aforesaid, join in the errors by the said mayor and city council aforesaid above assigned in the records of proceedings aforesaid, or judgment by the court of appeals here will be rendered against him in default thereof: and the said John Barron, survivor as aforesaid, by his attorney aforesaid, says, there is no error in the record of proceedings aforesaid, nor in the giving of the judgment aforesaid; and he prays that the court of appeals here will proceed to the examination as well of the record of proceedings aforesaid, as of the matters aforesaid, by the said mayor and city council aforesaid above for error assigned, and that the said judgment may be in all things affirmed, and so forth. Thereupon, further process of and upon the premises, between the parties aforesaid, is, by virtue of an act of assembly in such case made and provided, further continued before the court of appeals here, until the second Monday in June next: the same day is given to the said parties, there then to hear the judgment of the court of appeals here of and upon the said premises, and so forth.

At which said second Monday in June, being the eighth day of the said month, in the year of our Lord one thousand eight hundred and twenty-nine, come again into the court of appeals here the parties aforesaid, by their attorneys aforesaid; but because the court of appeals here are not yet advised what judgment to give of and upon the premises, a day therefore is further given to the parties aforesaid, with the consent of the said parties, by their attorneys aforesaid, to come before the court of appeals here, on the first Monday in December next, to hear the judgment of the court of appeals here of and upon the premises, for that the court now here as yet are not, and so forth.

At which said first Monday in December, being the seventh day of the said month, in the year of our Lord one thousand eight hundred and twenty-nine, come again into the court of appeals here the parties aforesaid, by their attorneys aforesaid; but because the court of appeals here are not yet advised what judgment to give of and upon the premises, a day therefore is further given to the parties aforesaid, with the consent of the said parties, by their attorneys aforesaid, before the court of appeals here, until the second Monday in June next, to hear the judgment of the court of appeals here of and upon the premises, for that the court now here as yet are not, and so forth.

At which said second Monday in June, being the fourteenth day of the said month, in the year of our Lord one thousand eight hundred and thirty, come again into the court of appeals here the parties aforesaid, by their attorneys aforesaid; but because the court of appeals here are not yet advised what judgment to give of and upon the premises, a day therefore is further given to the parties aforesaid, with the consent of the said parties, by their attorneys aforesaid, before the court of appeals here, until the first Monday in December next, to hear the judgment of the court of appeals here of and upon the premises, for that the court now here as yet are not, and so forth.

And now, at this day, to wit, the said first Monday in December, being the sixth day of the said month, in the year of our Lord one thousand eight

hundred and thirty, come again into the court of appeals here, as well the said mayor and city council of Baltimore, by John Scott and Roger B. Taney, their attorneys, as also the said John Barron, survivor as aforesaid, by Charles F. Mayer and David Hoffman, his attorneys; whereupon, as well the record and proceedings aforesaid, and the judgment given in form aforesaid, as the matters aforesaid by the said mayor and city council of Baltimore above for error assigned being seen, and by the court of appeals here fully understood, and mature deliberation thereupon had, for that it appears to the court of appeals here, that in the record and proceedings aforesaid, and also in the rendition of the judgment aforesaid, it is manifestly erred: therefore, it is considered by the court here, that the judgment aforesaid for those errors, and others in the record and proceedings aforesaid, be reversed, annulled, and held entirely as void; and that the said mayor and city council of Baltimore be restored to all things which, by reason of the judgment aforesaid, they have lost; and that the said mayor and city council aforesaid go thereof, without day, and so forth. It is also considered by the court here, that the said mayor and city council aforesaid recover against the said John Barron, survivor as aforesaid, the sum of three hundred and seventy-four dollars eighty-eight and one-third cents, adjudged unto the said mayor and city council aforesaid for his costs and charges by him sustained about the prosecution of his said appeal of and upon the premises as aforesaid prosecuted; and that the said mayor and city council aforesaid have thereof execution, and so forth.

Test: JOHN JOHNSON, *Clk.*

Afterwards, to wit, on the twenty-second day of June, in the year of our Lord one thousand eight hundred and thirty-one, the aforesaid John Barron, survivor as aforesaid, by his attorneys aforesaid, produced to the court of appeals here the writ of the United States for the correcting of errors of and upon the premises, commanding the record and proceedings of the judgment last aforesaid, so as aforesaid rendered, with all things concerning the same, to be transmitted to the Supreme Court of the United States; which said writ of error follows in these words, to wit:

UNITED STATES OF AMERICA, ss.—*The President of the United States to the honorable the judges of the court of appeals for the western shore of the State of Maryland, greeting:*

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court of appeals for the western shore of the State of Maryland, being the highest court of law or equity of the said State in which a decision in the suit could be had, before you or some of you, between the mayor and city council of Baltimore, appellants, and John Barron, appellee, on appeal from a judgment of the county court of Baltimore county, wherein was drawn in question the validity of an authority exercised under the State of Maryland, on the ground of its being repugnant to the Constitution of the United States, and the decision of the said court of appeals was in favor of such its validity, a manifest error hath happened, to the great damage of the said John Barron, as by his complaint appears; we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then,

348.

under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the first Monday of August next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and custom of the United States should be done.

Witness the honorable John Marshall, Chief Justice of the said Supreme Court, the second Monday in January, in the year of our Lord one thousand eight hundred and thirty-one.

WM. THOS. CARROLL, [L. S.]
Clerk of the Supreme Court of the United States.

Allowed by

JOHN BUCHANAN,
Chief Judge of the Court of Appeals.

In pursuance whereof, and according to the form and effect of the act of Congress of the United States in such case made and provided, a transcript of the record and proceedings of the judgment last aforesaid, so as aforesaid rendered, with all things concerning the same, together with the said writ of error, are hereby transmitted to the said Supreme Court of the United States accordingly.

Test: JOHN JOHNSON, *Clk.*

MARYLAND, sct.

I hereby certify that the foregoing is a full and true copy taken from the records and proceedings of the court of appeals for the western shore of said State.

In testimony whereof, I hereunto subscribe my name, and affix the seal of the said court of appeals, this first day of July, in the year of our Lord one thousand eight hundred and thirty-one.

JOHN JOHNSON, [L. S.]
Clerk Court of Appeals W. S. S. M.